Supreme Court, U.S.
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No. 01-1364

In The

Supreme Court of the United States

WALTER JITNER,

Petitioner,

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The U.S. Ninth Circuit Court Of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Answering parties Commercial Financial/SPC Acquisitions, Inc. and Financial Collections, Inc. (hereinafter collectively "Commercial") respectfully submit that the questions here should properly be:

1. Did the Ninth Circuit err in its application of California and Federal law to decide that promissory notes which were part of the assets of a failed bank taken over by the Federal Deposit Insurance Corporation ("FDIC") as receiver, and thereafter sold and assigned to Commercial in the secondary market, were admissible?

2. When the FDIC takes over a failed bank and its assets, is any endorsement required as to notes thereby acquired in order for the FDIC to obtain title, or does the FDIC acquire full title pursuant to express federal law?

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I.

RELEVANT FACTS

The only facts essential to determination of this are not in dispute. A bank that held notes reflecting a debt owed by Petitioner Walter Jitner ("Jitner") failed, and the FDIC took over that bank and acquired its assets. The FDIC thereby possessed the notes given by Jitner to the bank. Thereafter, the FDIC assigned the notes to Commercial. The notes contained allonges from the FDIC to Commercial, and the Commercial custodian of records testified that the notes were indeed obtained from the FDIC.

No evidence was introduced to show any negotiation of the notes from the failed bank to the FDIC. The Commercial custodian could not testify as to how the FDIC got the notes.

II.

SUMMARY OF ARGUMENT

The Ninth Circuit did not create or rely on any "federal common law", and correctly relied on Federal statutory law and on California statutory law in reaching its decision.

The statutory and case law relied on by Jitner is inapplicable and incorrectly applied to his arguments. The case herein is easily distinguishable from *O'Melveny & Myers v. FDIC* 512 U.S. 29, 114 S.Ct 2048, 129 L.Ed.2d 67 (1994) cited by Jitner and discussed herein, and California's *Commercial Code* § 3203 is irrelevant to the facts herein.

No evidence of negotiation to the FDIC is required to establish the FDIC's title to, and right to assign, the notes.

III.

ARGUMENT

A. The ruling of the Court of Appeals was based on Federal statutory law, not "federal common law".

12 U.S.C. § 1821(d)(2)(A) states in pertinent part:

> The Corporation shall, as conservator or receiver, and by operation of law, succeed to –
>
> > (ii) title to the books, records and assets of any previous conservator or other legal custodian of such institution. *Id.*

The court, in *Resolution Trust Corp. v. S & K Chevrolet Co.* 923 F.Supp. 135 (C.D.Ill 1996), held that the transfer of assets from a failed savings and loan to the Resolution Trust Corporation was accomplished *by operation of federal law*, and thus the RTC was receiving the assets under the express federal statute, not by assignment under state contract law.

In the case herein, clearly federal law provides that no endorsement is required for the FDIC to own the subject Jitner notes without the endorsement required by California *Commercial Code* § 3203. The Court of Appeals did not create "federal common law" to ignore California state law, it utilized federal *statutory* law which pre-empted the state law.

12 U.S.C. § 1820(f) states in pertinent part:

> Such . . . copies [of bank records] shall be deemed the original for all purposes, including introduction as evidence in all state and federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded. *Id.*

It is not required of Commercial that it produce the original notes in order to pursue collection litigation, or produce "sworn or certified copies" as Jitner argues. Even in non-FDIC cases, federal evidentiary law gives wide latitude as to introduction of records prepared by another. In *Miss. River Grain Elevator, Inc. v. Bartlett & Co. Grain*, 659 F.2d 1314 (1981 CA 5 La), the court stated at page 1319 the following principle, which also has been set forth in almost every other federal district:

> [Federal Evidence] Rule 803(6) does **not** (sic) require that the records be prepared by the business that has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude.

See also United States v. Veytia-Bravo 603 F.2d 1187 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980); *United States v. Hathaway* 798 F.2d 902 (6th Cir. 1986); *Saks Int'l Inc. v. M/V "Export Champion"* 817 F.2d 1011, 1013 (2nd Cir. 1987) (documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties"); *Munoz*

v. Strahm Farms, Inc. 69 F.3d 501, 503 (Fed. Cir. 1995) ("it is of no consequence that the records are created by another entity, as long as the other requirements of Rule 803(6) are met").

The 9th Circuit, in *U.S. v. Childs* 5 F.3d 1328 (9th Cir. 1993), discussed a number of situations where a party who was the present custodian, but who was not present when the documents were initially prepared or part of the organization that prepared them, could still offer admissible exhibits. The *Childs* court set forth the rule that: "Under Federal Rules of Evidence, documents may provide their own authentication or the necessary foundation may be established by extrinsic evidence." *Id.* at 1336.

The Commercial custodians of record testified that the two notes which were assigned to Commercial, were received from the FDIC. The FDIC put its allonge on the two Notes. These declarations meet the requirements of Rule 803(6) and the interpretation thereof.

When the above principles are applied to an FDIC-related case, they only reinforce the Congressional intent that the bank documents taken over by the FDIC speak for themselves as to authenticity and admissibility (certainly Congress intended the presumption that the FDIC would not tamper with them). Therefore it seems clear that no further foundation is necessary other than a declaration from the custodian of records of the assignee of the FDIC, that the records were received in a packet from the FDIC.

B. *O'Melveny & Myers v. FDIC* is not applicable to the facts herein.

Jitner's reliance on the case of *O'Melveny & Myers v. FDIC* 512 U.S. 29, 114 S.Ct 2048, 129 L.Ed.2d 67 (1994), for the proposition that there is no Federal law covering the case herein, is misplaced. Justice Scalia, in his opinion in *O'Melveny*, sets forth as the issue therein whether Federal (FDIC) law or a state rule of decision governs the **tort liability** of attorneys who provided services to a failed bank.

The *O'Melveny* opinion discussed the fact that there was no federal common law as to the **tort** involved, and that 12 U.S.C. §§ 1821 and 1823 ("FIRREA") did not expressly provide any law on this subject. Therefore, the opinion held California tort law controlled, and a federal court could not provide its own "common law" rule.

However, nowhere in the *O'Melveny* opinion did the Supreme Court limit the role of a federal court in *interpreting* federal statutes or the intent of Congress in relation thereto. In other words, where the federal statute covers the subject, the federal courts do not go out of business as to the necessary role of interpreting and applying the statute. *Id.* at 86.

Furthermore, the *O'Melveny* opinion specifically noted areas of law wherein FIRREA expressly preempted state law and therefore specifically controlled: the six year statute of limitations and the barring of claims and defenses against the FDIC based on alleged unrecorded agreements by the failed bank. *Id.* at 86.

The *O'Melveny* opinion pointed out that whenever there was conflict between the federal statute and state law, the former prevailed. *Id.* at 86. It is only where the statute is completely silent on the subject that state law is used rather than a federal court "filling the void" with federal "common law". *Id.* at 87.

Jitner has ignored the fact that express portions of the Federal statutes cover the issues herein, and no "common law" is required to fill any gap in Federal statutory law.

C. The *FDIC v. Houde* opinion does not require that the 9th Circuit opinion herein be accused of creating "federal common law".

FDIC v. Houde 90 F.3d 600 (1st Cir. 1996), dealt with whether the FDIC became a holder in due course upon taking over the assets of a failed bank, and held that under Maine law, the mere acquisition by the FDIC of notes from a failed bank did not qualify as a negotiation because there was no endorsement. *Id.* at 605.

Commercial herein has never argued (nor did the District Court or 9th Circuit opine) that there was a negotiation of the Jitner notes from the failed bank to the FDIC, or that the FDIC was a holder in due course. The FDIC merely took title *pursuant to federal statute*, and then transferred this title to Commercial by assignment.

The *Houde* court apparently pounced on a Code comment as requiring "proof of the 'transaction' as to how the transferee acquired a note", to require the FDIC to prove there was a transaction by which it got the Houde

note (there is no such requirement in the California statute itself).

Of course there is no transaction when the FDIC takes over a failed bank. By the express wording of 12 U.S.C. § 1821(d)(2)(A) the FDIC succeeds to the rights, titles and powers of a failed bank. Therefore the FDIC becomes one and the same as the failed bank, and *automatically* becomes the owner of assets such as the Jitner notes without any transaction or transfer.

The federal court sitting in Maine would apparently assume that 12 U.S.C. § 1821(d)(2)(A) does not mean what it says. For the California district court and the 9th Circuit to logically interpret the express wording in that statute to clearly mean that the FDIC obtained lawful title to the Jitner notes as part of the assets it *automatically acquired* from the failed bank, is not creating federal common law, nor does it contradict California law as is discussed below.

D. Jitner has misstated the application of California Commercial Code § 3203.

Jitner mistates the import of the California *Commercial Code* § 3203. This code section merely sets apart the rights of a holder in due course on commercial paper from those of an assignee of a debt such as evidenced by a note.

California *Commercial Code* § 3203(b), cited by Jitner on page A-13 of his Appendix, states in pertinent part

that "Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument. . . . ".

California courts have held " . . . that section [that endorsement must be an endorsement of the entire instrument] relates **solely** [emphasis in original] to negotiation of commercial paper [citation omitted] and not to an assignment of an interest in a note." *D'Orazi v. Bank of Canton* (App. 5 Dist. 1967) 254 Cal.App.2d 901, 904, 62 Cal.Rptr 704.

Furthermore, it is unquestioned that " . . . a bank which takes an item for collection . . . need not establish that it took the item by negotiation in order to satisfy [the provisions of the commercial code] . . . transfer of an instrument vests in the transferee all the rights of the transferor." *Security Pacific National Bank v. Chess* (App. 2 Dist 1976) 58 Cal.App.3d 555, 565, 129 Cal.Rptr. 852.

In *White v. Moriarty* (1993) 15 Cal.App.4th 1290, 19 Cal.Rptr.2d 200, the Court held, in a case wherein the California Court specifically replaced state law as to the statute of limitations with Federal law, that proof was not even required that the holder of a note establish that he received it from the FDIC. In response to the claim of the debtor, Moriarty, that there was no evidence that White acquired the subject note from the FDIC, the Court stated in Footnote 2:

> A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. Com. Code § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence. (Cal. Com. Code, former § 3307, subd. (1)(b).). Furthermore, an obligation possessed by

> a creditor is presumed unpaid. (Evid. Code § 635; Cal. Comm. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note. *Id.* at 1296.

12 U.S.C. § 1821(d)(2)(A) specifically created the FDIC's ownership of the Jitner notes without any transaction or transfer from the failed bank to the FDIC. The FDIC then had the right to enforce the Jitner notes pursuant to the California statute. The evidence is clear that the FDIC transferred the notes to Commercial.

The decision upholding Commercial's right to enforce the notes against Jitner is fully covered by the appropriate state and federal statutory law, and neither the district court nor the 9th Circuit created any federal common law.

IV.

CONCLUSION

For the above reasons, Commercial respectfully submits that Jitner's argument that the *O'Melveny* case has been ignored by the Ninth Circuit is unfounded. The Ninth Circuit opinion herein was not based on any "federal common law", but rather was soundly based on the federal statute to the extent it superseded state law, and otherwise on state law.

Jitner's Petition for the writ should be denied.

Respectfully submitted,

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12 U.S.C. § 1820

* * *

(f) Preservation of records by photography; admissibility as evidence

The Corporation may cause any and all records, papers, or documents kept by it or in its possession or custody to be photographed or microphotographed or otherwise reproduced upon film, which photographic film shall comply with the minimum standards of quality approved for permanent photographic records by the National Institute of Standards and Technology. Such photographs, microphotographs, or photographic film or copies thereof shall be deemed to be an original record for all purposes, including introduction in evidence in all State and Federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded. Such photographs, microphotographs, or reproduction shall be preserved in such manner as the Board of Directors of the Corporation shall prescribe and the original records, papers, or documents may be destroyed or otherwise disposed of as the Board shall direct.

* * *

12 U.S.C. § 1821

* * *

(d) Powers and duties of Corporation as conservator or receiver

* * *

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to –

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

* * *

USCS Fed Rules Evid R 803 (2002)

Rule 803. Hearsay Exceptions;
Availability of Declarant Immaterial

* * *

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

* * *

California Commercial Code § 1201

* * *

(20) "Holder," with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder," with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

* * *

California Commercial Code § 3308. Signatures; validity; presumptions and proof

* * *

(b) If the validity of signatures is admitted or proved and there is compliance with subdivision (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entit~~lement~~ to enforce the instrument under Section 3301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

California Evidence Code § 635. Obligation possessed by creditor

An obligation possessed by the creditor is presumed not to have been paid.

*659 F.2d 1314, *; 1981 U.S. App. LEXIS 16598, **;*
9 Fed. R. Evid. Serv. (Callaghan) 336;
32 Fed. R. Serv. 2d (Callaghan) 1095

MISSISSIPPI RIVER GRAIN ELEVATOR, INC. and Inter Financing Exchange, S.A., Plaintiffs-Appellants Cross Appellees, Ferruzzi, S.P.A., Counter Defendant-Appellant, Cross Appellee, v. BARTLETT & COMPANY, GRAIN, Defendant-Counter Plaintiff-Appellee Cross Appellant.

No. 80-3344

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT. N*

* FORMER FIFTH CIRCUIT CASE, SECTION 9(1) OF PUBLIC LAW 96-452 OCTOBER 14, 1980.

October 26, 1981

* * *

Fed.R.Evid. 803(6) provides that the following is not excluded by the hearsay rule:

A . . . report . . . of . . . events . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum report, record, or data compilation . . . unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness.

* * *

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*69 F.3d 501, *; 1995 U.S. App. LEXIS 29840, **; 36 U.S.P.Q.2D (BNA) 1499; 43 Fed. R. Evid. Serv. (Callaghan) 221*

MIGUEL A. MUNOZ, Plaintiff-Appellant, v. STRAHM FARMS, INC., FERNANDO FLORES, E. SCHAFFNER PACKAGING CO., SCHAFFNER FARMS, JIMMY CASTRO, SAMCO PACKING & EQUIPMENT, INC. and VALLEY HARVESTING & PACKING, INC., Defendants-Appellees.

95-1036

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

October 24, 1995, Decided

* * *

Reliability is the basis for admitting evidence under the business records exception. *See Saks Int'l, Inc. v. M/V "Export Champion"*, 817 F.2d 1011, 1013 (2d Cir. 1987). It was not unreasonable for the district court to conclude that Mayberry's testimony provided sufficient indicia of reliability. In addition to having a regular practice of sending film to Kodak for processing and checking the dates of the developed slides, he testified that he had several thousand slides and had never known Kodak to place an incorrect date on a slide. It is of no consequence that Mayberry himself did not develop the slides or place the dates on the slide frames, since a "custodian" under the business records exception need not be the person who created the records. *See United States v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979) ("It is unimportant under Fed. R. Evid. 803(6) that the custodian did not herself record the information or know who recorded the information."), cert. denied, 446 U.S. 919, 100 S. Ct. 1854, 64 L. Ed. 2d 274 (1980); *see also Saks Int'l*, 817 F.2d at 1013 (a

regular practice of receiving information from another person obviates the need to identify that person). Therefore, we conclude that the district court did not abuse its discretion in admitting into evidence Mayberry's testimony and dated slide frames.

Even assuming that the district court erred in admitting the challenged evidence, such error would have been harmless. The correction of an error must yield a different result in order for that error to have been harmful and thus prejudice a substantial right of a party. *See Cable Elec. Prods., Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1021, 226 U.S.P.Q. (BNA) 881, 884 (Fed. Cir. 1985).

* * *

*512 U.S. 79, *; 114 S. Ct. 2048, **;*
*129 L. Ed. 2d 67, ***; 1994 U.S. LEXIS 4446*
O'MELVENEY & MYERS, PETITIONER v. FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR AMERICAN DIVERSIFIED SAVINGS BANK ET AL.
No. 93-489
SUPREME COURT OF THE UNITED STATES

March 21, 1994, Argued
June 13, 1994, Decided

* * *

[***HR5A] Ed. 2d 442, 108 S. Ct. 2510 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. *See Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981); *Milwaukee v. Illinois*, 451 U.S. 304, 319, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981). Petitioner asserts that both these principles apply in the present case, by reason of 12 U.S.C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV), and the comprehensive legislation of which it is a part, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 103 Stat. 183.

Section 1821(d)(2)(A)(i), which is part of a title captioned "Powers and duties of [the FDIC] as . . . receiver," states that "the [FDIC] shall, . . . by operation of law, succeed to – all rights, titles, powers, and privileges of the insured depository institution. . . . " 412 U.S.C. § 1821(d)(2)(A)(i)

(1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S&L, cf. *Coit Independent Joint Venture v. FSLIC*, 489 U.S. 561, 585, 103 L. Ed. 2d 602, 109 S. Ct. 1361 (1989), obtaining the rights "*of* the insured depository institution" that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims *of* the S&L – in this case California tort claims potentially defeasible by a showing that the S&L's officers had knowledge – " 'any defense good against the original party is good against the receiver.' " 969 F.2d at 751 (quoting *Allen v. Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. *See* 12 U.S.C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limitations beyond period that might exist under state law); §§ 1821(e)(1), (3) (precluding state-law claims against the FDIC under certain contracts it is authorized to repudiate); § 1821(k) (permitting claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability); § 1821(d)(9) (excluding certain state-law claims against FDIC based on oral agreements by the S&L). *Inclusio unius, exclusio alterius.* It is hard to avoid

the conclusion that § 1821(d)(2)(A)(i) places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise. To create additional "federal common-law" exceptions is not to "supplement" this scheme, but to alter it.

* * *

* * *

Reiman now wishes to clarify that he did not mean to imply that Security or Security Federal were dissolved corporations at the time of receivership. Reiman avers that he has no idea whether they were dissolved or not, and the Complaint does not make this clear. Based on these new facts, the Court hereby vacates that portion of its earlier opinion which dismissed Plaintiff's punitive damages claim in Count I. Upon reconsideration, the Court finds that that issue is best resolved by a motion for summary judgment where additional facts beyond those of the Complaint can be proffered. Only if Security or Security Federal was dissolved prior to RTC's receivership can Reiman claim that Illinois law on punitive damages controls.

To the extent that Reiman is arguing that Illinois law should control regardless of whether Security or Security Federal were dissolved prior to RTC's receivership, the

Court rejects this argument. As the district court held in *Resolution Trust Corp. v. Liebert*, 871 F. Supp. 370, 373 (C.D. Cal. 1994), the mere prohibition of an assignment under state law does not affect RTC's rights to receivership under FIRREA § 1821(d)(2)(A)(i). RTC is receiving the corporation by operation of federal law, not having it assigned under state contract law. *See FTC v. S & K Chevrolet*, 868 F. Supp. 1047, 1053 (C.D. Ill. 1994) ("Contrary to Reiman's argument, it is clear that transfer of assets from Security to Security Federal and from Security Federal to the FTC were accomplished by operation of law."). Reiman's argument concerning contractual assignment of claims continues to ring hollow.

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*817 F.2d 1011, *; 1987 U.S. App. LEXIS 5984, **; 1987 AMC 1899*

Saks International, Inc., Plaintiff-Appellee, v. M/V "Export Champion," her engines, boilers, etc., and Farrell Lines, Inc., Defendants, Third-Party Plaintiffs-Appellees, Cross-Appellants, Maher Terminals, Inc., Third Party Defendant-Appellant, Cross-Appellee

Nos. 86-7998, 86-9034

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

The principal precondition to admission of documents as business records pursuant to Fed. R. Evid. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable. *See United States v. Mendel*, 746 F.2d 155, 166 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213, 84 L. Ed. 2d 331, 105 S. Ct. 1184 (1985); *United States v. Lavin*, 480 F.2d 657, 662 (2d Cir. 1973). Documents may properly be admitted under this Rule as business records even though they are the records of a business entity other than one of the parties, *see United States v. Consolidated Edison Co.*, 580 F.2d 1122, 1131 n.18 (2d Cir. 1978), and even though the foundation for the receipt is laid by a witness who is not an employee of the entity that owns and prepared them, *see United States v. Mendel*, 746 F2d at 166; *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir. 1986). Further, there is no requirement that the person whose first-hand knowledge was the basis of the entry be identified, so long as it was the business entity's regular practice to get information from such a person. *See United States v. Atchley*, 699 F.2d 1055, 1059 (11th Cir. 1983); *United States v. Basey*, 613 F.2d 198, 201 n.1 (9th Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S. Ct. 1854, 64 L. Ed. 2d 274

(1980). The determination of whether, in all the circumstances, the records have sufficient reliability to warrant their receipt in evidence is left to the sound discretion of the trial judge. *United States v. Lavin*, 480 F.2d at 662.

* * *

*5 F.3d 1328, *; 1993 U.S. App. LEXIS 24742, **;*
37 Fed. R. Evid. Serv. (Callaghan) 1344;
93 Cal. Daily Op. Service 7242
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
CRAIG LEE CHILDS, Defendant-Appellant.
No. 92-10645
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

July 12, 1993, Argued, Submitted,
San Francisco, California
September 28, 1993, Filed

* * *

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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*798 F.2d 902, *; 1986 U.S. App. LEXIS 28835, **;*
21 Fed. R. Evid. Serv. (Callaghan) 436
UNITED STATES OF AMERICA, Plaintiff-Appellee, v.
JAMES HARRISON HATHAWAY, Defendant-Appellant
No. 85-1520
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * *

1. *Admissibility Under Rule 803(6)*

Defendant's attack on the district court's conclusion is twofold. First, defendant points out that in order to lay the requisite foundation for the evidence to be admissible under Rule 803(6), the government relied in part on the testimony of an FBI agent. Defendant asserts that the use of this testimony was impermissible because the agent was "not . . . the proper custodian of the record as contemplated by Rule 803(6)." To support his argument, defendant relies heavily on *Calhoun v. Baylor*, 646 F.2d 1158 (6th Cir. 1981), where, in affirming the district court's exclusion of evidence, we stated: "Rule 803(6) is inapplicable because the witness . . . played no role in the creation of compilation of the records and was therefore in no position to attest to their reliability." 646 F.2d at 1162. From that, defendant argues that in this circuit only those individuals who play a role in the creation or compilation of records can be used to lay the requisite foundation under Rule 803(6). While this argument is not without some appeal, we are unable to accept it.

To accept defendant's interpretation of the passing statement in *Calhoun* would put this circuit at odds with every other circuit and commentator known by this court to have addressed the issue. Similarly, for us to have held in

Calhoun that only those who play a role in the creation or compilation of records can testify to lay the foundation would have required us to overrule our earlier holding in *United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977). In *Reese*, the authenticating witness did not have control over or a personal knowledge of the evidence contained in the record at issue. Nevertheless, we held that the records in question were admissible since the employee had "knowledge of the [business'] regular practices." 568 F.2d at 1252. *See also United States v. Wables*, 731 F.2d 440, 449 (7th Cir. 1984) (citing *Reese* to support the holding that "the witness [used to lay the foundation] need only have knowledge of the procedures under which the records were created.").

Thus, contrary to defendant's argument, there is no reason why a proper foundation for application of Rule 803(6) cannot be laid, in part or in whole, by the testimony of a government agent or other person outside the organization whose records are sought to be admitted. When a witness is used to lay the foundation for admitting records under Rule 803(6), all that is required is that the witness be familiar with the record keeping system. *See Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1061 (1st Cir. 1985); *Wables*, 731 F.2d at 449; *NLRB v. First Termite Control Co.*, 646 F.2d 424, 427 (9th Cir. 1981); *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980); *Reese*, 568 F.2d at 1252; 4 J. Weinstein & M. Berger, Weinstein's Evidence, para. 803(6)[02], at 803-178 (1985) ("The phrase 'other qualified witness' should be given the broadest interpretation; he need not be an employee of the entity so long as he understands the system.").

In urging that the district court erred, defendant's second argument is that the records should not have been admitted because they were untrustworthy and inaccurate. Rule 803(6) expressly provides that evidence otherwise admissible under Rule 803(6) is to be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." On the issue of trustworthiness, as with other evidentiary holdings, "the trial court is given great latitude." *Mississippi River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314, 1319 (5th Cir. 1981). Thus, on review, we will reverse the district court's decision only if we find a clear abuse of discretion. *See, e.g., State Office Systems, Inc. v. Olivetti Corp.*, 762 F.2d 843, 845 (10th Cir. 1985); *Guest v. Bailes*, 448 F.2d 433, 437 (6th Cir. 1971).

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*603 F.2d 1187, *; 1979 U.S. App. LEXIS 11368, ***
UNITED STATES of America, Plaintiff-Appellee, v.
Luis Esteban VEYTIA-BRAVO, Defendant-Appellant.
Nos. 78-5742, 78-5743
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

October 5, 1979

* * *

Fed. R. Evid. 803(6)(a) excludes from the application of the hearsay rule: memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 803(6) does not require that records be prepared by a business that has custody of them. If circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or supervised its preparation. Testimony by the custodian of the record or other qualified witness that the record is

authentic and was made and kept in the regular course of business suffices to support is admission.

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*254 Cal. App. 2d 901, *; 1967 Cal. App. LEXIS 1471, **; 62 Cal. Rptr. 704, * * **

VIOLET B. D'ORAZI, as Administratrix, etc., et al., Plaintiffs and Appellants, v. BANK OF CANTON, Defendant and Respondent

Civ. No. 777

Court of Appeal of California, Fifth Appellate District

October 3, 1967

* * *

However, that section relates solely to *negotiation* of commercial paper (*Wright v. Shoenhair*, 100 Cal. App. 163 [280 P. 174]), and not to an *assignment* of an interest in a note. It is unquestionably true that as to negotiation: "An endorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment." (Cal. Com. Code, § 3202, subd. (3).)

In 80 American Law Reports at page 414, the following general rule is stated with respect to the right to enforce in equity a partial assignment when all of the parties to the debt are joined in a single action such as we have here: "Notwithstanding many broad statements seemingly to the contrary met with in courts of law or elsewhere, the rule overwhelmingly supported by the cases wherein the point has been involved or squarely considered is that the assignment of part of a debt, although unassented to by the debtor, is enforceable against him in equity. The reasons, and apparently the only reason, obtaining at law for refusing to enforce such an assignment, that if given effect the debtor would be deprived of

the right to pay his debt in solido and might be subjected to many actions, embarrassments, and responsibilities not contemplated in his original contract, does not apply in equity, whose procedure contemplates that all persons at interest be made parties and have their rights determined by a single decree; consequently, in equity, the rule denying validity to such assignments ought not to, and generally does not, obtain."

California cases cited in support of that law note recognize, or clearly intimate, the existence of the rule, as follows: *Pierce v. Robinson*, 13 Cal. 116; *Pope v. Huth*, 14 Cal. 403; *Grain v. Aldrich*, 38 Cal. 514 [99 Am.Dec. 423]; *Goldman v. Murray*, 164 Cal. 419 [129 P. 462]. (*See also Kent v. Kent*, 6 Cal.App.2d 488 [44 P.2d 445]; 5 Cal.Jur.2d Rev., Assignments, § 44, pp. 431-433, § 68, p. 476; 8 Cal.Jur.2d, Bills and Notes, § 51, pp. 382-383; 6 Am.Jur.2d, Assignments, § 76, pp. 257-259, § 77, pp. 259-261; Rest., Contracts, § 156.)

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*58 Cal. App. 3d 555, *; 1976 Cal. App. LEXIS 1540, **;*
*- 129 Cal. Rptr. 852, * * * ;*
19 U.C.C. Rep. Serv. (Callaghan) 544
SECURITY PACIFIC NATIONAL BANK et al.,
Plaintiffs and Respondents, v.
J. THOMAS CHESS et al., Defendants and Appellants
Civ. No. 46439
Court of Appeal of California,
Second Appellate District, Division Four
May 20, 1976

* * *

The only court decision which plaintiff cites for its interpretation of section 3201 is *Bowling Green Inc. v. State Street Bank and Trust Co.* (1st Cir. 1970) 425 F.2d 81. In that case Bowling Green negotiated a government check to Bowl-Mor, who deposited the check in State Street Bank. The bank immediately credited a portion of the check against an overdraft in Bowl-Mor's account, and shortly afterwards applied the balance in that account against debts which Bowl-Mor owed the bank. There was no evidence that Bowl-Mor had indorsed the check. The ground of the Court of Appeals decision, as stated in its opinion, is as follows: " . . . We therefore hold that a bank which takes an item for collection from a customer who was himself a holder need not establish that it took the item by negotiation in order to satisfy § 4-209 [of the Uniform Com. Code, corresponding to California Uniform Com. Code. § 4209]." (*Id.*, at p. 84.)

In the course of its discussion the court said: " . . . The issue, however, is not whether the Bank bears the burden of proof, but whether it must establish that it took the item in question by endorsement in order to meet its burden. We think not. The evidence in this case indicates

that the Bank's transferor, Bowl-Mor, was a holder. Under Mass.Gen.Laws Ann. c. 106, § 3-201 (a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201(a), transfer of an instrument vests in the transferee all the rights of the transferor. As the Official Comment to § 3-201 indicates, one who is not a holder must first establish the transaction by which he acquired the instrument before enforcing it, but the Bank has met this burden here." (*Id.*, at p. 83-84.)

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*15 Cal. App. 4th, 1290, *; 1993 Cal. App. LEXIS 525, **; 19 Cal. Rptr. 2d 200, * * * ; 93 Cal. Daily Op. Service 3599*
PETER K. WHITE, as Trustee, etc.,
Plaintiff and Appellant, v. MICHAEL JAMES MORIARTY,
Defendant and Appellant.
No. A055618
COURT OF APPEAL OF CALIFORNIA,
FIRST APPELLATE DISTRICT, DIVISION ONE
May 14, 1993, Decided

* * *

Because there was substantial evidence that Moriarty expressly ratified prior acts in connection with the purchase and financing of the camera, there is no need to discuss White's argument regarding the alternative theory of ratification by acceptance of benefits. Regarding Moriarty's contention that he never assumed personal liability for the corporate debt, we observe that the note was signed only in the individual capacities of Anderson and Moriarty. The only mention of the corporation was that the debt was secured by the camera and the equipment lease from Nisus Video. There is no issue of alter ego liability.[2]

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[2] Without citation of authority, Moriarty argues that there was no substantial evidence that White actually acquired the note from the FDIC. However, the note bears the endorsement of FDIC to GFS and from GFS to White. A person in possession of an instrument endorsed to him is the holder of the instrument. (Cal. U. Com. Code, § 1201, subd. (20).) Signatures are presumed genuine in the absence of contrary evidence. (Cal. U. Com. Code, former § 3307, subd. (1)(b).) Furthermore, an obligation possessed by a creditor is presumed unpaid. (Evid. Code, § 635; Cal. U. Com. Code, former § 3307, subd. (2).) In the absence of any contrary evidence, the endorsements on the promissory note constituted substantial evidence of White's status as holder of the note.